

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Civil Writ Petition No.3230 of 2007

Smt.Suvarna Sitaram Shigwan

Petitioner

Vs.

Rukmini Sadashiv Gite & anr.

Respondents

Mr.G.V.Pandya for petitioner.

CORAM: B.H.MARLAPALLE, J.

April 25, 2007.

P.C.

. Heard the learned counsel for the petitioner who is the plaintiff in RAD Suit No.218/389 of 2005. In the said petition the defendant no.2 filed an application below Exhibit 3 praying for the written statement to be taken on record as it was filed beyond 120 days. This application was rejected by the learned Judge of the Small Causes Court on 20/4/2006 by passing the order below Exhibit 9. The defendant no.2, therefore, filed Revision Application No.128 of 2006 which has been allowed by the Division Bench of the Small Causes Court by its order dated 3/4/2007 and hence this petition.

. The trial Court rejected the application by discarding the explanation set out by the applicant on the point of delay caused in filing the written

statement. It may be noted that writ summons were served on the defendant on 27/6/2005 and she had caused her first appearance before the Registrar of the trial Court on 7/7/2005. The application at Exhibit 9 was submitted before the trial Court on 6/12/2005 seeking permission to file written statement and for condonation of delay. It is also not disputed that the written statement was signed and verified by the said defendant on 5/12/2005. The defendant contended that on 26/7/2005 the entire Kurla area was flooded due to heavy rainfall and she had to leave the room she was occupying and go to her native place where she resided upto 25/11/2005. The plaintiff while opposing the application at Exhibit 9 had submitted that the explanation furnished by the defendant was false and it was furnished with an ulterior motive to mislead the Court. As per the plaintiff in the Roznama dated 25/8/2005 of the trial Court it would be seen that the defendant no.2 was present before the Registrar and, therefore, it could not be accepted that on or after 26/7/2005 the defendant had left Mumbai and gone to her native place in Ratnagiri District. This contention of the plaintiff was accepted by the trial Court and it held that no exceptional circumstances were made out by

the defendant no.2 to condone the delay caused in filing the written statement and consequently the application came to be rejected.

. The revision Court did not agree with the reasoning set out by the trial Court in rejecting the application. The revision Court perused the Roznama of 25/8/2005 in which it was shown that the defendant no.2 was present. However, the defendant no.2 had furnished an explanation to the effect that on 25/8/2006 on her behalf her son was present before the Registrar and she was out of station. This explanation has been found to be satisfactory by the revision Court. In addition, the trial Court had relied upon an affidavit of Mr. Manoj B. Shigwan brought on record by the plaintiff and this Mr. Shigwan claimed to be a neighbour of the defendant no.2. In his affidavit dated 18/1/2006 he had purported stated that on 25/8/2002 the defendant no.2 was seen in her house and she was very much in Mumbai. Whereas in the affidavit dated 8/2/2006 said Mr. Shigwan stated that the statement made by him in his earlier affidavit dated 18/1/2006 was not correct and in fact the defendant was not available in Mumbai on 25/8/2005. The revision Court, therefore, held

that in view of the affidavits being contradictory to each other none of them could be accepted.

. In the case of Salem Advocate Bar Association v. Union of India [(2005) 6 SCC 344] while dealing with the powers of the trial Court to condone the delay in filing written statement the apex Court stated thus:

"The use of the word "shall" in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules of

procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

. As noted earlier, the trial Court rejected the application of the defendant no.2 solely on the ground that she was present before the Registrar on 25/8/2005 and her explanation that she was out of Mumbai after 26/7/2005 could not be accepted. The revision Court rightly stepped in and accepted the explanation furnished by the defendant no.2 that her son was present before the Registrar on 25/8/2005 and she was out of Mumbai from 26/7/2005 onwards and she returned on 25/11/2005. The view taken by the revision Court cannot be termed as perverse or grossly erroneous so as to cause interference in the same under the supervisory powers of this Court under Article 227 of the Constitution.

. Hence the petition is rejected summarily.

(B.H.MARL